United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2025

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIGOVERTO GARCIA,

Appellant,

-against-

VITO TERNULLO, Superintendent,

Appellee.

[redacted]

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P/S

BRIEF FOR APPELLANT

FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

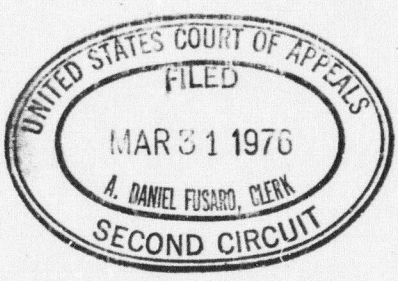

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TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIGOVERTO GARCIA, Appellant, -against- VITO TERNULLO, Superintendent, Appellee.	Docket No. 76-5572

BRIEF FOR APPELLANT

FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the failure to suppress the statement made by appellant during custodial interrogation by the police without renewed Miranda warnings and without any basis for inferring that appellant voluntarily waived his Fifth Amendment right not to incriminate himself, requires reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant, Jr.) entered on December 11, 1975, denying without a hearing appellant's petition for a writ of habeas corpus.

On January 14, 1976, the District Court granted a certificate of probable cause and leave to appeal in forma pauperis, and by order dated February 25, 1976, this Court assigned The Legal Aid Society, Federal Defender Services Unit as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

On May 28, 1972, at 5:00 a.m., a man named Jose Martinez was shot (4-5*). Thereafter, Martinez was taken to Lincoln Hospital (6). Before losing consciousness, he gave to the police a description of the individual who shot him (8). After an operation (8), Martinez communicated with New York State Detective Kerins,** (8,41)

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* Numerals in parentheses refer to pages of the transcript of the pre-trial hearing held in State court.

** Because of the operation, Martinez could not talk. However, he indicated his answer to Kerins' question by blinking his eyes. Blinking once meant yes, and blinking twice, meant no. (8,41).

who confirmed the information Martinez had previously given to other police officers (42). This information included Martinez' statement that he was shot by an individual named "Frankie", a physical description of "Frankie", and "Frankie's" address (9, 41-42).

Kerins and two other detectives went to that address and were directed by the superintendent to the fifth floor (43, 54). There the police officers saw appellant and two other people in a room drinking wine (43). Detective Kerins interviewed separately the two other people in another room. Both of the men stated that the third man was Frankie. Appellant was then arrested and handcuffed (43,56).

After the arrest, Detective Kerins informed appellant of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966)(45-46, 57). This was the only time appellant was told of these rights (61). Detective Kerins then asked if appellant wanted to answer questions without an attorney:

> I asked him if he wanted to proceed at that time. He did not state whether he wanted an attorney or not. I asked him again if he understood, and he said yes. I asked him if he wanted to proceed. He then said to me, 'You are doing . . . ',similar to, "You are doing the talking.' I can't remember the exact words he said, but he gave out the words as though I'm in a position to do the talking. 'What do you want -', 'What do you want to talk about?' I asked him where the gun was. He said, 'I don't know.' I again asked him where the gun was. He then again said he did not know.
>
> (46-47)

The police searched the room for the gun but did not find any weapon (47, 58).

Appellant was taken to Lincoln Hospital where, as a result of a show-up, appellant was identified by Martinez as his assailant (15-16, 24-26, 29-30, 47).

After this identification, the police officers took appellant to the stationhouse where the officers again questioned appellant about the location of the gun. The Miranda warnings that had been given immediately after appellant's arrest were not repeated.

At the stationhouse, appellant was told that he was accused of attempted murder, attempted robbery, and possession of weapons and was informed of the possible punishment for these crimes. The police officers also read the applicable Penal Law sections to appellant (47-48, 60-61). Moreover, Detective Kerins told appellant that if he wanted to help himself and cooperate by giving up the gun, Detective Kerins would bring the facts of appellant's cooperation to the attention of the District Attorney and Judge (48, 61).

> At that point he [appellant] came out. I [Kerins] asked him where the gun was. He had said no. Again, I asked him what did you do with the

> the gun. And, he said,'If I give up the gun, I blow my whole case' (61)(Emphasis added)*

After a short conversation, Detective Kerins again asked appellant if appellant wanted to give Kerins the gun, and Kerins testified that appellant said "no." Kerins then began to process appellant (48).

Prior to trial appellant moved to suppress the statement he had made to Detective Kerins (2). The trial court denied this motion and held that after his arrest appellant had been advised of his rights, understood those rights and that appellant's statements were voluntary (119-120).**

On June 7, 1973, appellant pleaded guilty to assault in the first degree. His conviction was affirmed without opinion by the Appellate Division, First Department, People v. Garcia, 366 N.Y.S. 2d 359 (1975), and leave to appeal to the New York Court of Appeals was denied on March 18, 1975.***

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* See also pages 63-64 of the transcript and P 10 of the Affidavit in Opposition submitted in the District Court in opposition to appellant's application for habeas corpus. (Doc. #2 to the Record on Appeal). Kerins initial testimony had been that appellant stated: "If I give up the gun, will I blow my whole case?" (48).

** The trial court's decision, denying appellant's motion to suppress, is "B" to appellant's separate appendix.

*** Appellant preserved his right to challenge the failure to suppress his inculpatory statements. C.P.L. §710.20(3), 710.70(2); Lefkowitz v. Newsome, 420 U.S. 283 (1975). On appeal in the State courts, appellant challenged the validity of the trial court's denial of appellant's motion to suppress the statements made to the police. Appellant argued inter alia, that the failure

(Footnote continued on next page)

By affidavit dated April 17, 1975, appellant applied, pursuant to 28 U.S.C. §2241, for a writ of habeas corpus and vacature of his judgment of conviction. Appellant argued that his statement to the police had been obtained in violation of his Fifth Amendment right not to incriminate himself in light of Miranda v. Arizona, 384 U.S. 436 (1966).

In an opinion dated December 11, 1975, the District Court rejected appellant's claim. Without re-examining the constitutional significance of the facts developed in the State court (See Neal v. Biggers, 409 U.S. 188, 193 (1975), United States ex rel Gonzalez v. Zelker, 477 F.2d 797, 800 (2d Cir. 1973), cert. den. 414 U.S. 924 (1973)), the District Court denied appellant's request for a writ of habeas corpus without a hearing and held that appellant had not sustained the burden of proving

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(Footnote continued from last page) . . .

to repeat the Miranda warnings given after arrest, in light of appellant's assertion of his Miranda rights, the facts in this case, and the interrogation to which appellant was subjected, indicated that appellant had not voluntarily waived his right not to incriminate himself as required by Miranda v. Arizona, supra. (See Appellant's Brief to the Appellate Division, First Department, Document #4 to the Record on Appeal). Thus, as the District Court here held, appellant has exhausted his available state remedies. United States ex rel Garcia v. Ternullo, 75 Civ. 2852 at p. 3. The District Court's opinion is "C" to appellant's separate appendix.

that his statement was involuntary. Appellant's Appendix C at p. 6.

ARGUMENT

THE FAILURE TO SUPPRESS THE STATEMENT MADE BY APPELLANT DURING CUSTODIAL INTERROGATION BY THE POLICE WITHOUT RENEWED MIRANDA WARNINGS AND WITHOUT ANY BASIS FOR INFERRING THAT APPELLANT VOLUNTARILY WAIVED HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF, REQUIRES REVERSAL.

The facts in this case are not in dispute: they show appellant's assertion of the right to remain silent, after being advised of the right, and a resumption of interrogation after a show-up without renewed warnings. To the contrary, the officials promised rewards if appellant cooperated after making clear his extremely precarious situation.

Based on the information supplied by the victim, Detective Kerins arrested appellant and informed him of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966). The detective then asked if appellant wanted to "proceed." Appellant remained silent. Thus, after this initial questioning, appellant asserted his Fifth Amendment right not to incriminate himself.

However, Detective Kerins continued to interrogate appellant and again asked if appellant wanted to proceed. Appellant replied in substance that it was the detective who was talking. This reply, considered with appellant's preceding silence, was yet a continuing assertion of the constitutional right not to discuss the facts of the crime. Despite this, Detective Kerins persisted in his questioning, asking appellant about the location of the gun. Appellant responded that he did not know.* Undaunted, the detective repeated the inquiry and appellant again responded that he did not know. These repeated denials were appellant's attempt to terminate the questioning and, in fact, they compelled the detective to stop the interrogation in accordance with appellant's original desires.

Based on these facts, it is clear that appellant claimed his Fifth Amendment right not to incriminate himself. Miranda v. Arizona, supra, 384 U.S. 473-475. No further questioning was permissible without renewed warnings:

> . . . renewed Miranda warnings are required before the reinterrogation of a suspect who has indicated that he wishes to remain silent.
>
> (United States v. Gaynor, 472 F.2d 899, 900 (2d Cir. 1973); United States v. Collins, 462 F.2d 792, 802 (2d Cir. 1972) (en banc))

* Even if this statement is considered to be a false exculpatory statement, it could not constitute a total surrender of appellant's right to remain silent. Miranda v. Arizona, 384 U.S. at 476. See Appellant's brief at 10 infra.

United States v. Wedra, 343 F. Supp. 1183, 1188 (S.D.N.Y. 1972); see also, Hill v. Whealon, 490 F.2d 629, 635 (6th Cir. 1974); Williams v. Brewer, 509 F.2d 227, 233 (8th Cir. 1974); United States v. Clark, 499 F.2d 802 (4th Cir. 1974). Compare, United States v. Gay, 522 F.2d 429, 431-32 (6th Cir. 1975) and United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970).

However, Detective Kerins did not follow this required procedure here.* After the police unsuccessfully searched for the gun, appellant was taken to the hospital to be identified by Martinez. There, in a personal show-up confrontation with the victim, appellant was identified as the assailant. After this identification procedure, appellant knew that he was directly implicated in a serious crime and this knowledge inevitably served to undermine his resolve to remain silent. See United States v. Wedra, 343 F. Supp. 1183, 1188 n.21 (S.D.N.Y., 1972).

Appellant's realization of both the seriousness of the crime and of the indicia of his participation in it were reinforced by police activities after appellant

* Officer Kerins testified that the stationhouse interrogation of appellant occurred prior to the processing procedures (48). Thus, in light of appellant's previous silence and refusals to discuss the crime, this interrogation could have had no other purpose but to elicit incriminating information and circumvent the requirements of Miranda.

was brought to the stationhouse. Detective Kerins told appellant that he was accused of the extremely serious crimes of attempted murder, attempted robbery, and possession of weapons. The detective told appellant of the possible punishment for these crimes and read the applicable provisions of the State penal code to appellant. Instead of advising appellant that his earlier claim of his right to remain silent was still available and appropriate, as required, Michigan v. Mosely, 44 U.S.L.W. 4015 (Dec. 9, 1975),* Detective Kerins reinforced the inherently compelling pressures to speak, Miranda v. Arizona, supra, 384 U.S. at 467, by telling appellant that appellant should help himself and cooperate by giving up the gun and that any cooperation would be brought to the attention of the District Attorney and Judge. All of these facts had the inevitable effect of further vitiating the efficacy of the Miranda warnings that had been given previously.

Officer Kerins then persisted in asking appellant about the gun, despite appellant's previous denials of knowledge in less compelling circumstances. Appellant's

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* Renewed warnings were also necessary here because appellant was never told that he could "cut off questioning" at any time. Since appellant was not aware of that right, he may well have believed that his earlier assertion that he did not know the location of the gun as well as his awareness of the seriousness of his circumstances and the detective's insistent questioning and suggestions to cooperate, might well have indicated to appellant that appellant could no longer insist on his right to silence. To the contrary, appellant had such a right. Michigan v. Mosely, supra, 44 U.S.L.W. at 4018; Miranda v. Arizona, supra.

response was "no" (61). This was the same response that had previously been successful in compelling the detective to terminate the prior interrogation. The detective did not cease his questioning but again inquired where the gun was. Appellant then made the inculpatory statement at issue here. The detective's failure to give new Miranda warnings prior to resumption of the questioning after the assertion of rights requires reversal of this case. United States v. Collins, supra; United States v. Gaynor, supra.

Moreover, since the detective failed to renew those required warnings, there is no basis for inferring that appellant voluntarily waived his right not to incriminate himself and knowingly decided to implicate himself in the crime.* Michigan v. Mosely, 44 U.S.L.W. 4015 (Dec. 9, 1975); United States v. Collins, supra, 462 F.2d at 802; United States v. Gaynor, supra, 472 F.2d at 900; United States v. Clark, 499 F.2d at 806-808.

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* In Miranda v. Arizona, supra, 384 U.S. at 475, the Supreme Court stated:

> . . . [A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact, eventually obtained.

In fact, the conclusion that appellant's statement was involuntary and resulted from police tactics and the inherent compulsion of custodial interrogation, is apparent from the facts here.

> The standard of voluntariness is not whether the accused was coerced in traditional terms but whether appropriate measures were taken to safeguard his rights and to insure that his statements were the product of free choice.
>
> (United States v. Clark, supra, 409 F.2d 806-807)

The Supreme Court in Michigan v. Mosely, 44 U.S.L.W. 4015, 4018 (December 9, 1975), has recently indicated that the critical question is "whether [the] 'right to cut off questioning' was 'scrupulously honored.' Here, this right, deemed by the Supreme Court to be a "critical safeguard" was completely ignored by the actions of the police at the stationhouse and by Detective Kerins' renewed custodial interrogation of appellant hours after appellant had been warned of his constitutional rights, remained silent and told the police that he did not know about the gun.

Thus, renewed warnings were required here before any re-interrogation, both to insure that appellant knew that he had the right to terminate any interrogation - a right which the detective never informed appellant that

he could invoke - and to guarantee that this right was scrupulously respected. Michigan v. Mosely, supra, 44 U.S.L.W. at 4018.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and the writ of habeas corpus should issue, releasing appellant from custody unless the State re-tries him within sixty days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 31, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Nathan Silberman